IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-104

UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH, INC., et al.,

Petitioners,

v.

HUGH L. CAREY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR STATE RESPONDENTS

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for State Respondents
Hugh L. Carey, Mario Cuomo,
Warren Anderson and
Stanley Steingut
Two World Trade Center
New York, N. Y. 10047

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

GEORGE D. ZUCKERMAN
Assistant Attorney General
Of Counsel

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Question Presented

Did the enactment of Chapters 588, 589, 590, 591 and 599 of the New York Laws of 1974, insofar as they altered assembly and senate district lines in the area commonly known as Williamsburgh in Kings County to satisfy objections expressed by the Attorney General of the United States to the prior district lines pursuant to § 5 of the Voting Rights Act of 1965, as amended, violate petitioners' rights under the Fourteenth and Fifteenth Amendments?

Statement

A.

The Complaint

Plaintiffs are a group of Jewish organizations and individuals speaking for the Hasidic community in the Williamsburgh section of Brooklyn, New York. The complaint asserts that the Hasidic community in Williamsburgh has for the past twenty-five years been included within one State senate district and one State assembly district (App. 6).[1] Under the 1972 reapportionment (Chapter 11 of the Laws of 1972), the Hasidic community of Williamsburgh was included within the 57th State Assembly District and the 17th State Senate District.

On April 1, 1974, the Attorney General of the United States, who was named as a defendant in this action, acting through Assistant Attorney General J. Stanley Pottinger, issued a determination stating that the assembly and senate district lines in Kings County established by Chapter 11 of the Laws of 1972 as well as the congressional district lines in Kings County established by Chapters 76, 77 and 78 of the New York Laws of 1972 were invalid under § 5 of the Voting Rights Act because the purportedly over concentration of non-whites in certain districts were considered by the United States Attorney General to produce a racially discriminatory effect (App. 14-16). The effect of the United States Attorney General's determination of April 1, 1974 under § 5 of the Voting Rights Act was to preclude the use of the district lines that were not approved by the Attorney General.

To satisfy the demands of the United States Attorney General, the New York State Legislature on May 29 and 30, 1974 redrew the assembly, senate and congressional district

[1] "App." refers to the Appendix filed by petitioners.

lines in Kings County. Laws of 1974, Chapters 588, 589, 590, 591 and 599.

Plaintiffs contend that in enacting the 1974 redistricting statutes, the State of New York violated plaintiffs' rights, purportedly secured by the Equal Protection and Due Process Clauses of the Fourteenth Amendment and by the Fifteenth Amendment, by dividing the Williamsburgh Hasidic community into two assembly districts (the 56th and 57th) and into two senate districts (the 23rd and 25th) since such divisions were allegedly only made necessary by the race conscious standards imposed by the United States Department of Justice.

The complaint sought (1) injunctive relief against the administration and implementation of the 1974 redistricting laws by the respondent Governor and other State officials and New York City Board of Elections; (2) a judgment against the Attorney General declaring that the standard under which he rejected the 1972 laws was unconstitutional; (3) declaratory and injunctive relief against the 1974 laws; and (4) injunctive relief against implementation of any redistricting plan other than that of 1972, or alternatively that established by the Judicial Commission appointed by the New York Court of Appeals in 1966[2] (App. 12-13).

B.

Background

Sections 4 and 5 of the Federal Voting Rights Act of 1965, as amended in 1970, 42 U.S.C. §§ 1973b, 1973c, provide that in any state or political subdivision thereof which

[2] In *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633 (1964), this Court held that New York's apportionment scheme violated the Fourteenth Amendment owing to population disparities between districts. In *In re Orans*, 15 N.Y. 2d 339, 206 N.E. 2d 854 (1965), the New York Court of Appeals established a Judicial Commission to draw up a new apportionment plan. The Commission's plan was approved in *In re Orans*, 17 N.Y. 2d 107, 216 N.E. 2d 311 (1966).

utilizes a test as a pre-condition for voting and in which less than 50% of persons of voting age voted in the 1968 Presidential Election, any changes in voting laws or procedures (including reapportionment plans) enacted since November 1, 1968 may not take effect until they have been approved by either the Attorney General of the United States or by the District Court in the District of Columbia.

The Counties of Kings, The Bronx and New York came within the purview of the Voting Rights Act upon the filing by the Attorney General of the United States on July 31, 1970 of a determination that the literacy requirement imposed by the State of New York (N.Y. Const., Art. II, § 1; N.Y. Election Law §§ 150, 168) constituted a "test or device" within the meaning of the Voting Rights Act,[3] and upon the determination by the Director of the Bureau of the Census on March 27, 1971 that less than 50% of the persons of voting age residing in The Bronx, Kings and New York Counties voted in the Presidential Election of 1968.[4]

The Voting Rights Act permits a state or county that has become subject to its provisions to be exempted from the filing requirements of the Act by obtaining a declaratory judgment in the District Court for the District of Columbia adjudging that neither the purpose or effect of any test employed as a pre-condition for voting in the affected area was to deny or abridge any citizen's right to vote on account of race or color. The State of New York brought such an action on behalf of The Bronx, New York and Kings Counties on December 3, 1971. After a four-month investigation into election procedures in the three affected counties, the Justice Department consented to the entry of the declaratory judgment sought by the State of New York and the District Court on April 13,

[3] 35 Fed. Reg. 12354 (1970).

[4] 36 Fed. Reg. 5809 (1971).

1972 issued an order granting the State's motion for summary judgment exempting the three affected counties from the filing requirements of the Voting Rights Act, and denying a motion brought by the NAACP to intervene. *New York State* v. *United States*, D.D.C. Civil Action No. 2419-71 (1972) (unreported). The NAACP unsuccessfully appealed to this Court from the denial of its motion to intervene. *NAACP* v. *New York*, 413 U.S. 345 (1973).

In October, 1973, the Justice Department moved to reopen the declaratory judgment granted to the three affected counties on the ground that a decision by District Judge Charles E. Stewart in the Southern District of New York in the case of *Torres* v. *Sachs*, 381 F. Supp. 309 (S.D.N.Y., 1973), had held that the failure of the New York City Board of Elections to provide a Spanish translation of the ballot violated the rights of Spanish-speaking citizens living in New York City in contravention of the Federal Voting Rights Act.

The Justice Department's motion to reopen was granted by the three-judge District Court in the District of Columbia, without a hearing on the merits of the application, and on January 10, 1974 the District Court entered an order rescinding the previous declaratory judgment that had been granted to the State of New York and directed the State, on behalf of the three affected counties to comply with the filing requirements of § 5 of the Voting Rights Act. An application for a stay of that order was denied by the District Court. 65 F.R.D. 10 (D.D.C., 1974).

Subsequently, the State of New York moved for summary judgment to exempt the three affected counties from further coverage under §§ 4 and 5 of the Voting Rights Act. Affidavits in support of the State's motion were submitted by senior election officials in each of the three affected counties denying that there was any racially discriminatory application of New York's literacy requirement and further attesting to the actions that the New

York City Board of Elections had taken to encourage non-whites to register and vote. Also submitted in support of the State's motion for summary judgment was an affidavit from Assistant Attorney General George D. Zuckerman which annexed a copy of a letter from the Director of the United States Bureau of the Census attesting to the fact that the Census Bureau had included resident aliens in its determination of persons of voting age population in 1968, and an exhibit demonstrating that if resident aliens had been excluded from the determination of voting age population, more than 50% of the persons of voting age population in New York, The Bronx and Kings Counties would have participated in the Presidential Election in 1968 thereby bringing those counties outside of the application of the so-called trigger formula imposed by § 4(b) of the Voting Rights Act.[5]

The State of New York further argued that the sole reliance by the United States on the decision in *Torres* v. *Sachs, supra* as a basis for opposing New York State's exemption from the filing requirements of the Voting Rights Act was in error since the Voting Rights Act, as then written,[6] did not require a Spanish-translation of the ballot.

On April 30, 1974, the District Court, without written opinion, denied the motion of the State for summary judg-

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[5] See Jurisdictional Statement, pp. 25-28 in *New York State on behalf of New York, Bronx and Kings Counties* v. *United States,* October Term, 1973, No. 73-1740. It should be noted that the State of New York's contention that the trigger formula in § 4 of the Voting Rights Act should only apply to "citizens" of voting age, rather than "persons" of voting age, was accepted by Congress in the 1975 Amendments to the Voting Rights Act. Public Law No. 94-73 (July 24, 1975) amending 42 U.S.C. § 1973b(b), 89 Stat. 401.

[6] In the 1975 Amendments to the Voting Rights Act, Congress, for the first time, required voting notices, forms, instructions and ballots to be in a minority language in certain circumstances. See 42 U.S.C. § 1973aa-1a(c) as added by Public Law No. 94-73 (July 24, 1975).

ment and entered a judgment dismissing the action for declaratory judgment. An appeal taken by the State of New York from the District Court's orders of January 10 and April 30, 1974 resulted in the summary affirmance of such orders, without hearing, by this Court. *New York* v. *United States,* 419 U.S. 888 (1974).

The effect of the above proceedings has been to require the submission by the State of New York of all voting laws and procedures, including reapportionment plans, that have been enacted since November 1, 1968 to the Department of Justice insofar as they involve the Counties of The Bronx, Kings and New York. On April 1, 1974 the Department of Justice, in a letter from Assistant U. S. Attorney General J. Stanley Pottinger to State Assistant Attorney General George D. Zuckerman (App. 14-16), refused to approve changes in certain assembly and State senate district lines in Kings and New York Counties (based on Ch. 11 of the New York Laws of 1972) on the ground that while the purpose of those district lines might not have been to discriminate, the Department of Justice could not conclude that such lines "will not have the effect of abridging the right to vote on account of race or color."

With particular reference to the State legislative district lines in Kings County, the Pottinger letter observed:

> "Senate district 18 appears to have an abnormally high minority concentration while adjoining minority neighborhoods are significantly diffused into surrounding districts. In the less populous proposed assembly districts, the minority population appears to be concentrated into districts 53, 54, 55 and 56, while minority neighborhoods adjoining those districts are diffused into a number of other districts. As with the congressional plan we know of no necessity for such configuration and believe other rational alternatives exist." (App. 15)

Under the provisions of § 5 of the Voting Rights Act, the Justice Department's ruling of April 1, 1974 prevented any election from taking place in Kings and New York Counties under the district lines that were not approved by the Attorney General of the United States.

While the State had the right to challenge the Justice Department's determination of April 1, 1974 by way of an action in the three-judge District Court for the District of Columbia under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, the State was, as the majority opinion in the Court below correctly characterized, "under the gun" to satisfy the Department of Justice's objections. Not only was it highly unlikely that a declaratory judgment action challenging the Department of Justice's determination could be judicially resolved in time to permit candidates for public office to know the boundaries of the district lines in time to collect petitions for the 1974 primary,[7] but there was also a pending three-judge District Court action brought by the NAACP to compel the State to enact new district lines in compliance with the Department of Justice's order. *NAACP* v. *New York City Board of Elections*, 72 Civ. 1460 (S.D.N.Y.). The State was faced with the distinct possibility that if it challenged the Department of Justice's determination and did not receive a favorable judicial determination in time to permit the collection of designating petitions for the 1974 primary, the three-judge Court sitting in the Southern District might, at the NAACP's request, order all State legislative contests in New York and Kings Counties to be run at large.

Accordingly, the Joint (legislative) Committee on Reapportionment prepared for introduction to the New York State Legislature a series of bills at a special session which

[7] The first date for the collection of designating petitions for New York's 1974 primary election was on June 17, 1974. Such signatures were required to be filed no later than July 15, 1974. New York Election Law § 149-a, subds. (2), (4). The primary was scheduled for September 10. Laws of 1974, ch. 9.

were enacted on May 29 and 30, 1974 to redraw the assembly, State senate and congressional lines in Kings County and the assembly and senate lines in New York County in an effort to satisfy the demands of the United States Department of Justice.[8] Laws of 1974, Chapters 588, 589, 590, 591 and 599. In preparing these laws, Richard S. Scolaro, the Executive Director of the Joint Committee on Reapportionment testified below (App. 103-106, 113-115) that in discussions with the Justice Department over the telephone and in person, he was advised that there be three senate and two assembly districts in the area of Kings County in which Williamsburgh is located with "substantial non-white majorities." Since the assembly district in which the entire Hasidic community was located under the 1972 reapportionment law had a non-white population of 61.5%, which the Justice Department indicated was insufficient, Mr. Scolaro "got the feeling," although the number was not specifically referred to, that a 65% non-white majority district would be approved.

The 1974 reapportionment amendments were submitted by the State of New York to the Department of Justice on May 31, 1974. By letter dated July 1, 1974 from Assistant United States Attorney General J. Stanley Pottinger to Assistant State Attorney General George D. Zuckerman, the Department of Justice announced that the Attorney General of the United States did not interpose any objection to the implementation of the 1974 reapportionment statutes (App. 283).

[8] The result of the 1974 reapportionment, according to the Interim Report of the Joint Committee on Reapportionment, Albany, New York, May 27, 1974 (App. 175-189), was to produce out of the twenty-two assembly districts involved in Kings County, five districts having a non-white population of over 75% and two additional districts with a non-white population of over 65%. Under the 1972 reapportionment, which the Justice Department had refused to approve, there had been six assembly districts in Kings County with over 60% non-white population and one with over 50% non-white, of which five were represented by non-whites (App. 181).

C.

Proceedings Below

On June 20, 1974 a full evidentiary hearing was held before District Judge Bruchhausen in connection with petitioners' motions for a preliminary injunction and for summary judgment and the motion of the United States to dismiss the complaint for failure to state a claim for which relief can be granted and for lack of jurisdiction.

On July 25, 1974, the District Court entered an order denying the petitioners' motions for a preliminary injunction and summary judgment and granted respondents' motion to dismiss the complaint. The opinion of the District Court (377 F. Supp. 1164) held that in view of the approval of the 1974 reapportionment plan by the Attorney General of the United States, petitioners' cause of action insofar as it might be based on the Voting Rights Act of 1965 must be dismissed. The allegations by petitioners of a violation of their rights under the Fourteenth and Fifteenth Amendments were also held by the District Court to be untenable. The Court pointed out that there was no constitutional right for members of a community to be protected against the division of their community in the drawing of district lines. The District Court also pointed out that it was well settled that even if the Legislature had employed racial considerations in the drawing of the 1974 lines, such considerations were not constitutionally precluded where they were undertaken "to correct a wrong".

The District Court's order was affirmed by a 2-1 decision of the Court of Appeals. *United Jewish Organizations of Williamsburgh* v. *Wilson,* 510 F. 2d 512 (2nd Cir., 1974). The majority opinion, by Circuit Judge Oakes, noted that while the District Court did not have jurisdiction to "review" the Attorney General's determination of April 1, 1974 disapproving the 1972 Act, Section 5 of the Voting

Rights Act was not a bar to this suit except as to relief against the Attorney General. The Court went on to observe that while petitioners did not have standing to seek relief against the State respondents as representing the Hasidic community, they did have standing as white voters.

Turning to the merits, the Court held that there was no showing that the effect of the challenged 1974 district lines was to invidiously cancel out or minimize the voting strength of white voters in Kings County. The Court observed that Kings County is 35.1% non-white (combining the 24.7% black and 10.4% Puerto Rican population). Under the 1974 plan three of the ten senate districts in Kings County, or 30%, contained substantial non-white population majorities, while seven or 31.4% of the twenty-two assembly districts in Kings County contained a substantial majority of non-white population (510 F. 2d at 523 n. 21). Rejecting the argument that districting of racial lines is *per se* unconstitutional when taken to comply with standards of the Attorney General of the United States acting under the Voting Rights Act, the Court concluded that:

> ". . . so long as a districting, even though based on racial considerations, is in conformity with the unchallenged directive of and has the approval of the Attorney General of the United States under the Act, at least absent a clear showing that the resultant legislative reapportionment is unfairly prejudicial to white or non-white, that districting is not subject to challenge." (510 F. 2d at 525).

In a dissenting opinion, Judge Frankel stated that this case concerned "the drawing of district lines with a central and governing premise that a set number of districts must have a predetermined non-white majority of 65% or more in order to insure non-white control in those districts". Judge Frankel concluded that no pre-existing wrong was shown of such a character in this case as to justify the use of racial quotas.

ARGUMENT

I.

There is no constitutional right to preserve ethnic community unity in the drawing of district lines.

The gravamen of petitioners' complaint was that the members of the Hasidic community in Williamsburgh, as a "closely knit" community with close cultural and religious ties, should not have been divided into separate assembly and State senate districts by the challenged 1974 State statutes.

While petitioners' desire to keep their community intact in the drawing of district lines is understandable, it must be recognized that there is no Federal constitutional or statutory requirement prohibiting a state from drawing legislative or congressional district lines which cut across city and county borders,[9] let alone any requirement which would prohibit the division of so-called "community" lines. Nor does any group of voters have a constitutional right to be included within an electoral district that is especially favorable to the interest of one's own group, or to be excluded from a district that is dominated by some other group. *Whitcomb* v. *Chavis*, 403 U.S. 124, 156 (1971);

[9] The New York State Constitution has never prohibited the division of city or community lines in the drawing of legislative districts. However, Article III §§ 4 and 5 of the New York Constitution prohibits the drawing of senate and assembly lines which divide counties and towns having less than one ratio of apportionment and guarantees to each county (with the exception of Hamilton County) at least one assembly seat. In *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633 (1964), these State constitutional provisions were held invalid insofar as they required the creation of legislative districts with substantial population disparities. As a result, subsequent reapportionment statutes have divided county as well as town lines. See *In re Orans*, 15 N.Y. 2d 339, 206 N.E. 2d 854, appeal dismissed 382 U.S. 10 (1965); *Matter of Schneider* v. *Rockefeller*, 31 N.Y. 2d 420, 293 N.E. 2d 67 (1972).

Wallace v. *House*, 515 F. 2d 619, 630 (5th Cir., 1975); *Taylor* v. *McKeithen*, 499 F. 2d 893 (5th Cir., 1974); *Gunderson* v. *Adams*, 328 F. Supp. 584 (S.D. Fla., 1970), aff'd 403 U.S. 913 (1971); *Ferrell* v. *State of Oklahoma, ex rel. Hall*, 339 F. Supp. 73 (W.D. Okla., 1972), aff'd 409 U.S. 939 (1972).

The exact number of communities in Kings County has been the subject of dispute among historians,[10] political scientists, sociologists and real estate salesmen. Petitioners' witness, Congressman (and former New York City

[10] In 1959, the Community Council of Greater New York in their two-volume study entitled "Population Characteristics" divided Brooklyn into the following communities: Greenpoint, Williamsburgh, Bushwick-Ridgewood, Brooklyn Heights-Fort Greene, Bedford-Stuyvesant, Crown Heights, Brownsville, East New York, South Brooklyn-Redhook, Park Slope, Sunset Park-Gowanus, Bay Ridge, Boro Park-Kensington, Bensonhurst, Gravesend, Coney Island, Flatbush-East Flatbush, Canarsie, Midwood-Flatlands, and Sheepshead Bay.

In 1969, the New York City Planning Commission in its report, "Plan for New York City 1969: A Proposal, Vol. 3 Brooklyn," recognized seventy-four communities in Brooklyn (Kings County) which it proposed to divide in the following eighteen community planning districts: CPD #1—Williamsburgh, Greenpoint; CPD #2—Downtown Brooklyn, Fort Greene, Clinton Hill; CPD #3—Bedford-Stuyvesant, Ocean Hill, Tompkins Park, Stuyvesant Heights; CPD #4—Bushwick, Ridgewood; CPD #5—East New York, Spring Creek, Cypress Hills, New Lots, Broadway Junction; CPD #6—South Brooklyn, Park Slope, Brooklyn Heights, Cobble Hill, Boerum Hill, Carroll Gardens, Red Hook, Gowanus, Windsor Terrace; CPD #7—Sunset Park, Bush Terminal; CPD #8—Crown Heights, Prospect Heights, Children's Museum, Ebbets Field, Wingate, Lefferts Gardens; CPD #—East Flatbush, Rugby, Farragut, Clarendon, Vanderveer, Hyde Park; CPD #10—Bay Ridge, Fort Hamilton, Dyker Heights; CPD #11—Bensonhurst, Bath Beach, New Utrecht, Mapleton, Bay Parkway; CPD#12—Borough Park, Kensington, Mapleton, Bay Parkway, Ocean Parkway; CPD #13—Coney Island, Gravesend, Sea Gate; CPD #14—Flatbush, Midwood, Manhattan Terrace, Fiske Terrace, South Greenfield, Kings Highway, Old Flatbush, Caton Park; CPD #15—Sheepshead Bay, Neck Road, Brighton Beach, Manhattan Beach, Gerritsen Beach; CPD #16—Brownsville, Ocean Hill; CPD #17—Canarsie, Paerdegat Basin; CPD #18—Flatlands, Marine Park, Bergen Beach, Mill Basin.

Councilman) Frederick W. Richmond testified that there were "fifty or sixty clearly-defined communities in the County of Kings" (App. 31). It is obvious that each of these fifty or more communities, which vary considerably in population, could not be treated as separate entities in the establishment of 8.6 senate districts or 21.4 assembly districts that Kings County was entitled to by virtue of its population and still satisfy the overriding constitutional requirement that legislative districts must be equal in population. See *Reynolds* v. *Sims,* 377 U.S. 533 (1964); *WMCA, Inc.* v. *Lomenzo,* 377 U.S. 633 (1964).

In addition to the Federal constitutional requirement that districts be substantially equal in population, the New York State Constitution requires that in the formation of State legislative districts, "blocks which, from their location, may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants." N.Y.S. Const., Art. III, §§ 4, 5. In applying this so-called "block on the border" constitutional requirement, the 1974 redistricting statutes in Kings County created seven new assembly districts which each have the population of 120,768 while the new senate districts created in Kings County do not vary by more than one person in population. See Interim Report of the Joint Committee on Reapportionment, Appendix "C, K" (App. 192, 195).

A plea for separate community recognition, similar to the complaint in the instant action, was made by Negro residents of the East Elmhurst community in *Ince* v. *Rockefeller,* 290 F. Supp. 878 (S.D.N.Y., 1968). Plaintiffs in the *Ince* case argued that the division of East Elmhurst into two separate assembly districts was a constitutional deprivation of the rights of the Negro residents of that community who assertedly shared a common racial, political and cultural background. In rejecting that contention and in dismissing the complaint in the *Ince* case, District

Judge Pollack stated (p. 883):

> "It is obvious that each of the 44 communities in Queens could not be treated as separate entities in the establishment of 16 equal assembly districts that Queens County was entitled to by virtue of its population. Pleas for separate community recognition, similar to those raised by plaintiffs here, were made by intervenors from Flatbush and Bay Ridge in contesting the recently enacted congressional districts in New York State. In rejecting their contentions, the three-judge Court in its unanimous opinion in *Wells* v. *Rockefeller,* 281 F. Supp. 821, 825 (S.D.N.Y., 1968) stated:
>
> 'The Legislature cannot be expected to satisfy, by its redistricting action, the personal political ambitions or the district preferences of all of our citizens. For everyone on the wrong side of the line, there may well be his counterpart on the right side. The twenty or more identifiable communities in Brooklyn may well have preserved their own traditions from the days of the Dutch, although in today's rapidly changing world, this is doubtful. But even Brooklyn's large population will not support twenty community congressmen. Of necessity, there must be lines which divide.'"

Similarly, the Court below recognized that it would have been impossible for the New York Legislature to have preserved community political integrity and comply with *Reynolds* v. *Sims, supra.* 510 F. 2d at 521. Accordingly, the Court correctly held that petitioners did not have standing as representatives of the *Hasidic* community to seek relief against the State respondents.

II.

The challenged redistricting plan was enacted as a remedial measure in conformity with the unchallenged directive of the Attorney General of the United States and has the approval of the Attorney General pursuant to the Voting Rights Act.

During the course of petitioners' argument before the Court of Appeals and now in their brief before this Court, petitioners have modified the original theory of their complaint to contend that even if they do not have standing as representatives of the Hasidic community in Williamsburgh to challenge the State's 1974 redistricting plan, they have standing as *white* voters to argue that the 1974 reapportionment should be declared invalid because it involved the purposeful use of racial considerations in the drawing of district lines.

There is no dispute that the State of New York utilized racial statistics in drawing the 1974 redistricting plan. But the record in this case is also clear that the use of racial considerations in the preparation of the 1974 redistricting plan was not for any invidious discriminatory purpose, but was employed in support of a remedial measure designed to overcome the objections that the Attorney General of the United States had raised in refusing to approve New York's 1972 reapportionment statute.

The April 1, 1974 determination of the Department of Justice, set forth in the letter from Assistant United States Attorney General J. Stanley Pottinger (App. 14-16), refused to approve changes in certain assembly and senate district lines in Kings and New York Counties (based on Chapter 11 of the New York Laws of 1972) on the ground that while the purpose of those district lines might not have been to discriminate, the Department of Justice could not conclude that such lines "will not have the effect of abridging the right to vote on account of race or color."

With particular reference to the State legislative district lines in Kings County, the Pottinger letter observed:

> "Senate district 18 appears to have an abnormally high minority concentration while adjoining minority neighborhoods are significantly diffused into surrounding districts. In the less populous proposed assembly districts, the minority population appears to be concentrated into districts 53, 54, 55 and 56, while minority neighborhoods adjoining those districts are diffused into a number of other districts. As with the congressional plan we know of no necessity for such configuration and believe other rational alternatives exist." (App. 15)

While the State does not agree with the April 1, 1974 determination of the United States Attorney General,[11] the

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[11] The submissions by representatives of the State of New York to the Department of Justice in support of the 1972 reapportionment statute (Chapter 11 of New York Laws of 1972) showed that of the twenty-one full assembly districts in Kings County, six assembly districts had a non-white population in excess of 60% while a seventh district (the 59th AD) had a non-white population of 52.4% (App. 266). Five of these assembly districts were represented by non-white legislators in the 1973-74 session. The population statistics show that of the eight senate districts located fully within Kings County (which also contains parts of two other districts shared with Queens and New York Counties), three contained non-white majorities. Although only the 18th SD was represented by a non-white legislator in the 1973-74 session, the 25th SD which was represented by a white legislator had a non-white population of 68.7%.

The State of New York argued that the concentration of non-whites that appeared in the 1972 redistricting plan was the unavoidable result of residential factors since there are very few non-whites living in the southern half and in the western portion of Kings County (see the racial maps of Kings County appended to this brief).

In concluding that the State of New York had not met its legal burden of proving that the submitted plans did not have the effect of abridging the right to vote in Kings County, the Department of

(footnote continued on following page)

exigencies of time (see p. 8, *supra*) required that new legislation be enacted immediately to satisfy the objections of the Department of Justice and thereby permit an orderly primary and general election to take place in New York and Kings Counties in 1974.[12]

In endeavoring to satisfy the Department of Justice, it was obviously necessary for the New York Legislature to carefully consider the racial composition of individual City blocks in order to transfer non-white voters from the allegedly over-concentrated 18th Senate District and 53rd, 54th, 55th and 56th Assembly Districts into adjoining dis-

(footnote continued from preceding page)

Justice was apparently following the approach that any redistricting plan which does not maximize the voting potential of non-whites must be deemed to have a discriminatory effect. We believe such an approach not only ignores political realities (since it assumes black and Puerto Rican voters will unite behind a common candidate), but runs contrary to the teachings of this Court and lower Federal court decisions which have consistently held that no group is constitutionally entitled to an apportionment structure designed to maximize its political advantages. See *Whitcomb* v. *Chavis*, 403 U.S. 124, 149-160 (1971); *White* v. *Regester*, 412 U.S. 755, 765-766 (1973); *City of Richmond* v. *United States*, 422 U.S. 358 (1975); *Wallace* v. *House*, 515 F. 2d 619, 630 (5th Cir., 1975); *Zimmer* v. *McKeithen*, 485 F. 2d 1297, 1305 (5th Cir., 1973), cert. granted, 432 U.S. 1055 (1975); *Howard* v. *Adams County Board of Supervisors*, 453 F. 2d 455 (5th Cir., 1972); *Ferrell* v. *Oklahoma*, 339 F. Supp. 73, 83 (W.D. Okla.), aff'd 409 U.S. 939 (1972); *Mann* v. *Davis*, 245 F. Supp. 241, 245 (E.D. Va., 1965), aff'd 382 U.S. 42 (1965).

[12] Counsel for the State of New York were aware of the fact that although the plaintiffs in *Beer* v. *United States*, 374 F. Supp. 357 (D.D.C., 1974), prob. juris. noted 419 U.S. 822 (1974), had requested and received accelerated consideration of their declaratory judgment action challenging a determination of the United States Department of Justice pursuant to § 5 of the Voting Rights Act, a decision was not entered by the District Court until more than four months after the conclusion of oral argument. The April 1, 1974 determination of the Department of Justice was issued on the sixtieth and last date to consider New York's submission of the 1972 redistricting statute and came less than three months before the date for candidates to circulate designating petitions for legislative contests in New York State (see p. 8, *supra*).

tricts of allegedly under-concentrated minority voters. As reported in the Interim Report of the Joint Committee on Reapportionment, New York's 1974 reapportionment statutes involved the transfer of non-white pockets in the 18th Senate District into the 17th and 23rd Senate Districts to raise the percentage of non-white residents in the 17th Senate District to 77.1% and in the 23rd Senate District to 71.1%. These transfers reduced the percentage of non-white voters in the 18th Senate District to 72.1% (App. 179-180). In the Assembly, the Legislature transferred blocks containing a heavy concentration of non-white residents from the 56th and 55th Assembly Districts into the 57th and 59th Assembly Districts to create a non-white population of 65.0% in the 57th Assembly District and 67.5% in the 59th Assembly District (App. 181-185). These population shifts as reflected in the challenged statutes (Chapters 588, 589, 590 and 591 of the New York Laws of 1974) led to the securing of approval by the United States Attorney General on July 1, 1974 (App. 283). But the alterations in district lines that were necessary to obtain the Attorney General's approval and maintain equality of population among these legislative districts resulted in the division of the Hasidic community between the 56th and 57th Assembly Districts and between the 23rd and 25th Senate Districts (App. 112-115).

The use of racial considerations by public officials in support of a remedial measure designed to further integration has been sustained in a wide variety of cases.

In school desegregation cases, this Court has upheld the imposition of racial ratios among school faculties in *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969), and the use of a pupil assignment plan based on the race of students in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). See also *Wanner* v. *County School Board of Arlington County*, 357 F. 2d 452, 454 (4th Cir., 1966); *United States* v. *Jefferson*

County Board of Education, 372 F. 2d 836, 876 (5th Cir., 1966), cert. denied 389 U.S. 840 (1967).

Official recognition of race was found necessary to achieve fair and equal opportunity in the selection of grand juries in *Brooks* v. *Beto,* 366 F. 2d 1, 24 (5th Cir., 1966).

Consideration of race by public officials in promoting integrated housing has been sustained in *Norwalk CORE* v. *Norwalk Redevelopment Agency,* 395 F. 2d 920 (2nd Cir., 1968), and in *Otero* v. *New York City Housing Authority,* 484 F. 2d 1122 (2nd Cir., 1973).

Moreover, the use of racial quotas requiring preferential hiring of non-whites to overcome the past effects of racial discrimination in employment has been sustained. See *Erie Human Relations Committee* v. *Tullio,* 493 F. 2d 371 (3rd Cir., 1974); *Bridgeport Guardians, Inc.* v. *Members of Bridgeport Civil Service Commission,* 482 F. 2d 1333, 1340 (2nd Cir., 1973); *Castro* v. *Beecher,* 459 F. 2d 725, 736-737 (1st Cir., 1972); *Carter* v. *Gallagher,* 452 F. 2d 315, 331 (8th Cir., 1971), cert. denied 406 U.S. 950 (1972); *Associated General Contractors of Massachusetts, Inc.* v. *Altshuler,* 490 F. 2d 9 (1st Cir., 1973), cert. denied 416 U.S. 957 (1974).

Petitioners argue that the above cases involved race-conscious remedial measures designed to overcome a past history of official discrimination which has not been established in the case at bar. Rather, petitioners point out that there has been no finding or evidence of past discrimination against non-white voters in Kings County by any executive, legislative or judicial body to justify the remedy that the State has provided in response to the Justice Department's refusal to approve the 1972 legislative districts in that county.

It is true that the Justice Department's April 1, 1974 determination which objected to certain of the district lines in Kings County (App. 14-16) did not contain any

finding of past or present discrimination against non-white voters in Kings County, but rested on the Department's conclusion that the State had not met its burden[13] of proving that the submitted plans may not produce the effect of abridging the right to vote because of race or color in Kings and New York Counties. However, this Court in *Georgia* v. *United States,* 411 U.S. 526 (1973) held, in its majority opinion, that a specific finding of discrimination by the Attorney General was not required as a pre-condition to bar the enforcement of a statute that had not received the Attorney General's approval under Section 5 of the Voting Rights Act.

Since the State of New York was obliged to use racial statistics in the preparation of its 1974 reapportionment plan to overcome the objections that the Department of Justice had raised with respect to the prior district lines, it is clear that the 1974 reapportionment plan must be sustained as a remedial measure designed to secure compliance with the Voting Rights Act.

III.

A State may consider race in the drawing of district lines to attempt to achieve a "racially fair" result in the election of State legislators.

If this Court finds that the Department of Justice employed an invalid standard in rejecting New York's 1972 reapportionment plan for New York and Kings Counties,

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[13] The imposition of the burden of proof on the submitting authority by Title 28 CFR § 51.19, as interpreted by the Department of Justice in connection with New York's 1972 reapportionment plan (see footnote11, *supra*) raises the question as to whether any state can meet its burden of proving that a reapportionment plan does not have the purpose or effect of denying or abridging the right to vote because of race or color unless it can be demonstrated that no other reapportionment plan could have improved the chances for electing non-white legislators.

it does not necessarily follow that New York's 1974 reapportionment plan must be declared unconstitutional. Rather, the issue to be determined is whether a state may employ racial statistics in drawing district lines to improve a minority group's chance of electing legislators in proportion to their number in a county even when the state is under no legal compulsion to overcome a past history of racial discrimination.

Concededly, this Court has never had to consider the constitutionality of a reapportionment plan that involved a color-conscious effort to produce a "racially fair" result.[14] However, this Court's opinion in *Gaffney* v. *Cummings*, 412 U.S. 735 (1973), which involved a politically-conscious effort to achieve "political fairness" between the major political parties in a state, is instructive.

In *Gaffney, supra*, this Court found that virtually every senate and house district line in a reapportionment plan drawn for the Connecticut State Legislature by an apportionment board was drawn with the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican parties. But the majority

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[14] This issue does not appear to have been decided by any court. However, Federal courts have upheld the right of school boards to use racial classifications to correct *de facto* racial imbalance in a school system even where there was no constitutional duty to act. See *Offermann* v. *Nitkowski*, 378 F. 2d 22, 24 (2nd Cir., 1967) where the Court said "That there may be no constitutional duty to act to undo *de facto* segregation, however, does not mean that such action is unconstitutional." See also *Fuller* v. *Volk*, 230 F. Supp. 25, 33-34 (D.N.J., 1964), vacated on other grounds 351 F. 2d 323 (3rd Cir., 1965), 250 F. Supp. 81 (D.N.J., 1966); *Olson* v. *Board of Education*, 250 F. Supp. 1000 (E.D.N.Y., 1966). In *Porcelli* v. *Titus*, 302 F. Supp. 726 (D.N.J., 1969), aff'd 431 F. 2d 1254, 1257 (3rd Cir., 1970), cert. denied 402 U.S. 944 (1971), the right of the Newark Board of Education to consciously consider race in seeking to increase the number of black supervisory officials in the school system was sustained.

opinion by Mr. Justice White recognized that the fact that political considerations were taken into account in fashioning a reapportionment plan where its purpose was to provide districts that would achieve "political fairness" between the two major political parties, was not sufficient to invalidate it. The Court noted that the very essence of districting is to produce a more "politically fair" result than would be reached with elections at large, and that a "politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results" (412 U.S. at 753). The Court concluded that:

> ". . . neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State." 412 U.S. at 754.

Similarly, a "racially mindless" approach may also produce, whether intended or not, a grossly unfair result insofar as members of a particular minority group are concerned. For example, in Kings County the bulk of the black population is concentrated near the center of the county (see appendix, *infra*). Since the traditional method in drawing district lines in New York State prior to 1974 has been to start at the peripheries of a county and work towards the center (App. 94, 118), it is possible that the black population was divided into more districts than would have been the case if the redistricting procedures had started at the interior of the county. The 1974 district lines in Kings County were, accordingly, drawn with racial considerations in mind to avoid any unintentional discriminatory effects that prior districting plans may have had in reducing the chances to elect minority group representatives to the State Legislature.

Moreover, just as this Court in *Gaffney, supra,* recognized that it was more plausible to assume that those who redistrict and reapportion work with political data in mind, it is more realistic to recognize that most reapportionment draftsmen are cognizant of the racial composition of the districts they are fashioning. The fact that race is considered by a reapportionment draftsman should not, in and of itself, be a basis for invalidating the reapportionment plan.[15] It is only in the most flagrant examples of racial gerrymandering such as in *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960), or where it can be shown that racial considerations are employed to minimize or eliminate the political strength of a minority group that racial considerations in the drawing of district lines should be constitutionally condemned. Cf. *White* v. *Regester,* 412 U.S. 755, 765-770 (1973). As (then) Circuit Judge Stevens observed in his dissenting opinion in *Cousins* v. *City Council of the City of Chicago,* 466 F. 2d 847, 856 (7th Cir., 1972), cert. denied 409 U.S. 893 (1973):

> ". . . A test which would require legislators to act with complete indifference to the impact of districting on cognizable groups of voters is simply much too strict. It would either open the door to invalidation of all apportionment plans or require legislators to perform ridiculous charades in their public deliberations and to do their only significant work in private conference."

While petitioners' standing as *white* voters to challenge the 1974 reapportionment plan was upheld by the Court below, that Court held that there had been no showing "that the effect of the New York legislature's drawing the 1974 district lines as it did was invidiously to cancel out or minimize the voting strength of white voters in Kings County." 510 F. 2d at 523. Under the 1974 reapportionment plan,

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[15] See, Note, "Compensatory Racial Reapportionment," 25 Stanford L. Rev. 84 (1972).

whites who constitute 64.9% of the population of Kings County (for purposes of the Voting Rights Act, the Puerto Rican population is considered non-white), are in a majority in 68.6% of the assembly districts and 70% of the senate districts in Kings County. Nor was any evidence introduced or any claim asserted as to any history of official racial discrimination against whites, or any indication that the white community in Kings County has ever been the victim of political or other racial discrimination.

Thus, while there might be individual voters who would have preferred to have been in different legislative districts, the 1974 reapportionment plan in Kings County cannot be said to discriminate on the basis of race.

IV.

If the challenged portion of the 1974 reapportionment plan is invalid, this Court should mandate the return to the 1972 district lines in Kings County.

In the event this Court determines that the challenged 1974 reapportionment plan is unconstitutional, it should direct the District Court to order the use of the district lines established by Chapter 11 of the New York Laws of 1972 for the election of members of the New York Legislature from Kings County.

A remand by this Court without such instructions would threaten to throw the electoral processes in Kings County into a state of chaos. A civil action, *NAACP* v. *New York City Board of Elections,* 72 Civ. 1460 (S.D.N.Y.), is still pending before a statutory three-judge court in which the NAACP has requested an injunction pursuant to § 5 of the Voting Rights Act to enjoin the conduct of any election in Kings County (as well as New York County and The Bronx) that is held using district lines that have not been approved by the Attorney General. Since the Attorney General has not approved the district lines that were

established for Kings County by Chapter 11 of the Laws of 1972, a declaration by this Court invalidating the 1974 reapportionment plan without a direction to the District Court to order the use of the 1972 reapportionment plan would require the New York Legislature to draft still another redistricting plan for Kings County. It is obvious that the draftsmen of such a plan would be faced with a nearly impossible task in striving to meet the conflicting demands of the Department of Justice, petitioners and the NAACP. Moreover, the draftsmen[16] of a new reapportionment plan would be pressed by limitations of time to develop a plan in time for the 1976 primary election.[17]

The most equitable and feasible remedy, in the event of a remand, would be for this Court to direct the use of the district lines established by Chapter 11 of the New York Laws of 1972 for future elections in Kings County until validly superseded by an act of the New York Legislature. The legislative districts established by Chapter 11 are presently in operation throughout the State of New York with the exception of Kings and New York Counties, and have been found to be in compliance with the Constitutions of the State of New York and the United States by New York's highest court. *Matter of Schneider* v. *Rockefeller*, 31 N.Y. 2d 420, 293 N.E. 2d 67 (1972).

As noted earlier (n. 11, *supra*), six of the full twenty-one assembly districts in Kings County that were established by Chapter 11 of the New York Laws of 1972 had a non-

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[16] It must be noted that, at the present time, there is no legislative committee on reapportionment in New York State. The New York Legislature abolished the Joint Committee on Reapportionment in 1975 and terminated its staff. The computers that were used by the Joint Committee in preparing the 1972 and 1974 reapportionment plans have been returned to IBM.

[17] A primary election for state legislative and congressional seats in New York State is presently scheduled for September 14, 1976 (N.Y. Election Law § 191(1)). The first date for the circulation of petitions to qualify for the primary would be June 22, 1976 (N.Y. Election Law § 136(9)).

white population in excess of 60% while a seventh district had a non-white population of 52.4%. Three of the eight senate districts located fully within Kings County contained non-white majorities under the 1972 plan.

Accordingly, if this Court finds that the 1974 reapportionment plan was invalid in attempting to maximize the voting potential of a racial group, the use of the 1972 reapportionment plan in Kings County would provide for the future conduct of elections under district lines that do not discriminate against any racial group.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed. However, in the event this Court determines that the challenged 1974 reapportionment plan is unconstitutional, it should direct the District Court to order the use of the district lines established by Chapter 11 of the New York Laws of 1972 for the election of members of the New York Legislature from Kings County.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
Office & P. O. Address
Two World Trade Center
New York, N. Y. 10047

Attorney for State Respondents

Samuel A. Hirshowitz
First Assistant Attorney General

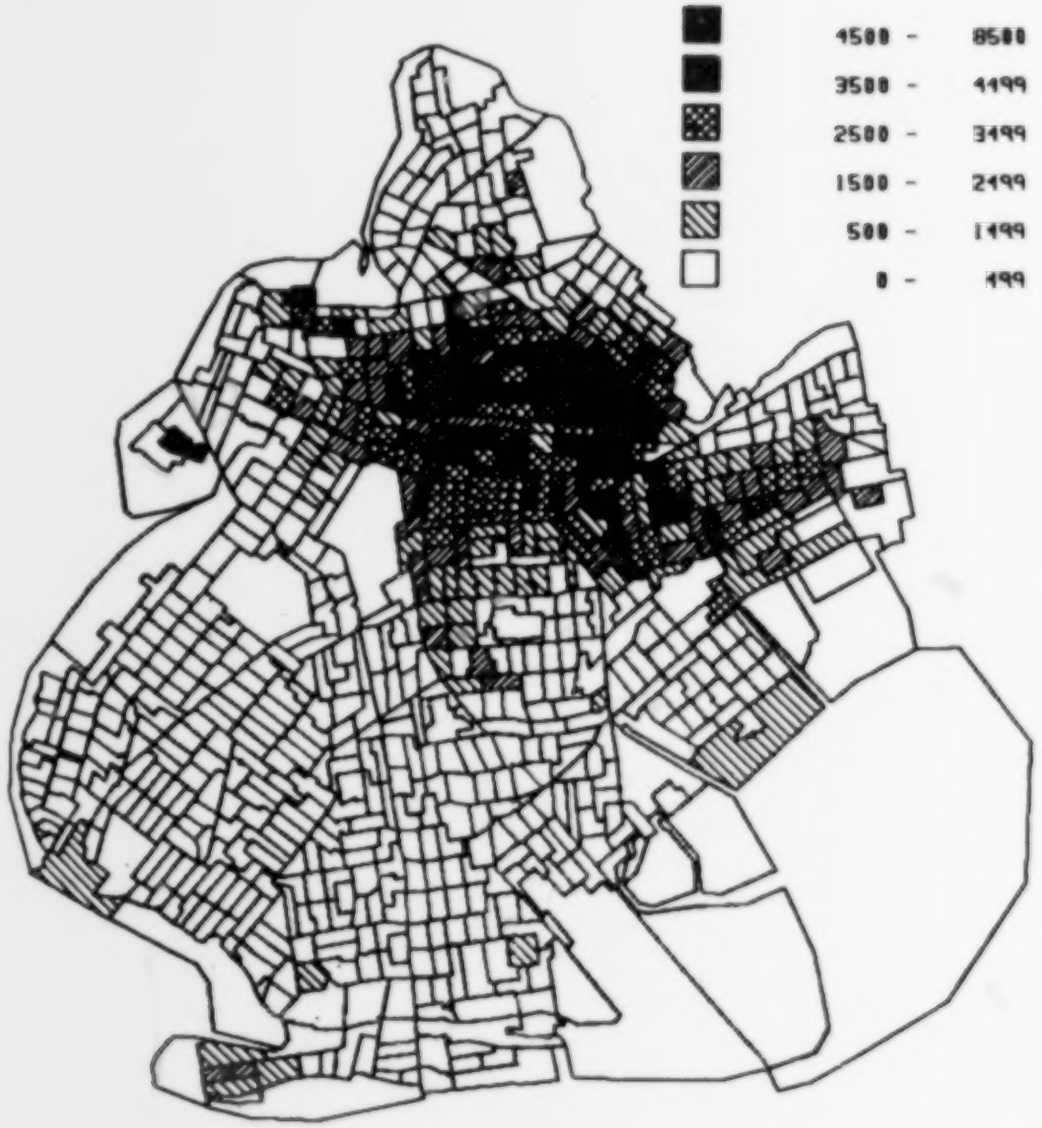
George D. Zuckerman
Assistant Attorney General
Of Counsel

APPENDIX

BROOKLYN BLACK POPULATION FROM
1970 U.S. CENSUS

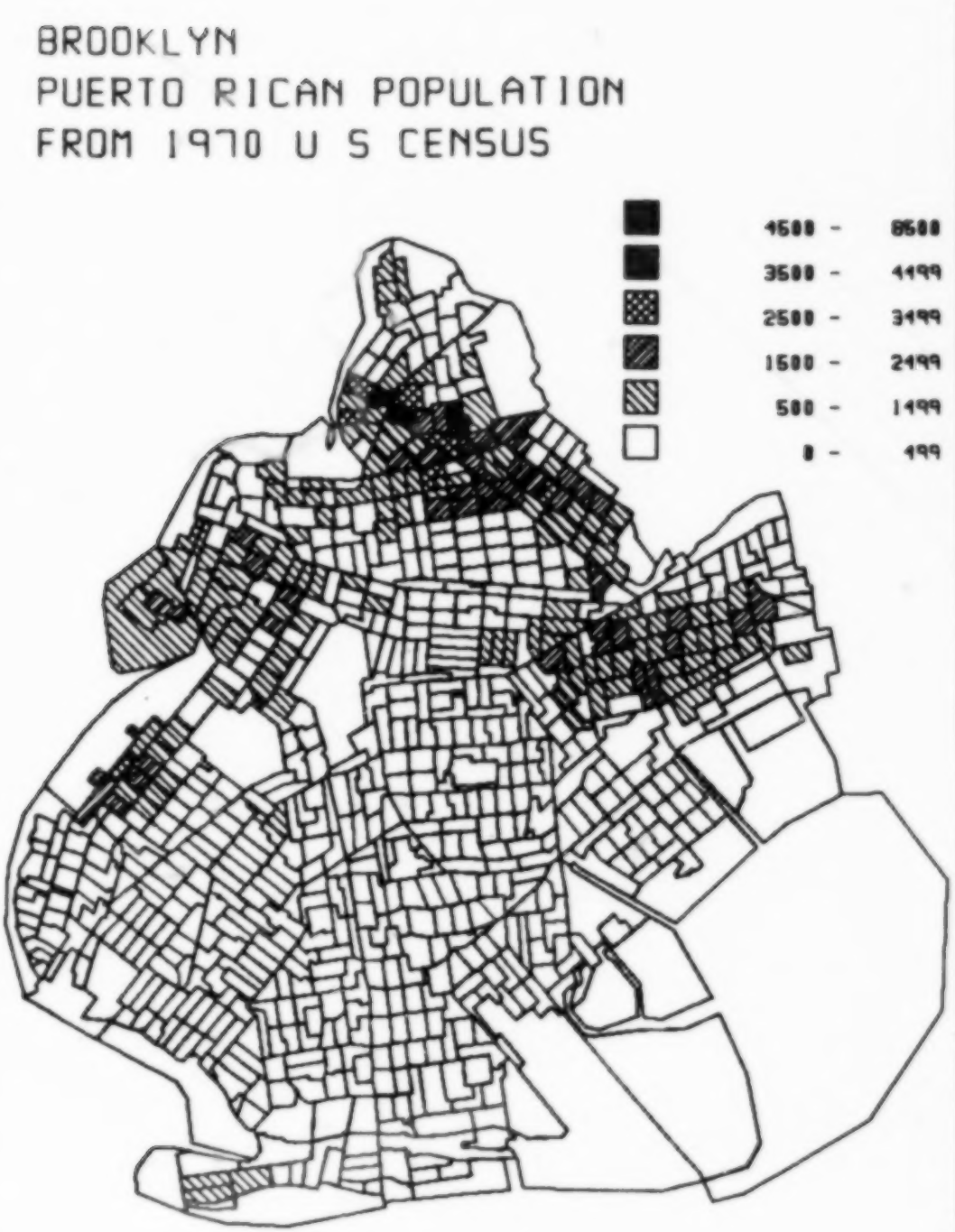
From the City Record, Official
Journal of the City of New York,
January 6, 1976, p. 18

BROOKLYN
BLACK POPULATION
FROM 1970 U S CENSUS



BROOKLYN PUERTO RICAN
POPULATION FROM 1970
U.S. CENSUS

From the City Record, Official
Journal of the City of New York,
January 6, 1976, p. 19



Map #12